

REPORTABLE (32)

PETRONELLA KAGONYE
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHIWESHE JA & KUDYA JA
HARARE: 9 OCTOBER, 2023 & 26 MARCH, 2024

T. Magwaliba with *R. Huni*, for the appellant

C. Muchemwa, for the respondent

MAVANGIRA JA:

1. This is an appeal against the whole judgment of the High Court handed down on 17 October 2022, dismissing the appellant’s appeal against her conviction and sentence, on a charge of theft of trust property, by the Regional Magistrate, Eastern Region (Anti-Corruption Court) on 8 June 2022.

FACTUAL BACKGROUND

2. The appellant is a former Minister of Public Service, Labour and Social Welfare. She was arraigned before the Regional Magistrates Court (the trial court) facing two counts of contravening s 136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] (the

Code), being fraud and one count of contravening s 113 (2) of the same Code, being theft of trust property. The judgment of the trial court records at pp 2-3 that:

“The developments that then ensued are that the first count was discharged at the close of the State’s case and the 2nd count was withdrawn after plea. The court is now concerned with the 3rd count which saw the light of the full trial.”

After the full trial, the appellant was found guilty as charged.

3. The charge on the remaining count was crafted as follows:

“CONTRAVENING SECTION 113(2) OF THE CRIMINAL LAW CODIFICATION AND REFORM ACT CHAPTER 9:23 ‘THEFT’ OF TRUST PROPERTY (sic)

In that on the date that is unknown to the Prosecutor but during the period extending from 01 June 2018 to 12 July 2020 and at POTRAZ, Harare, Petronella Kagonye took twenty (20) computers from POTRAZ, Harare, with an agreement that she (Petronela Kagonye) was going to hold those computers in trust and only give them to Goromonzi South Schools and in so doing beneficiary schools were to sign for those computers and the accused would submit acknowledgement of receipts (sic) of such computers to POTRAZ, in breach of this agreement accused failed to give any such schools such computers and further failed to give to POTRAZ proof of receipt of such computers by such schools. The accused in so doing failed to account for the computers given to her when called to do so by POTRAZ.”

4. The allegation as set out in the outline of the State case was that on a date to the Prosecutor unknown but during the period extending from 1 June 2018 to 12 July 2020, the appellant wrote a letter to the Ministry of Information, Communication Technology requesting computers to donate to schools in Goromonzi South.
5. On 20 June 2018, the then Minister, Honourable Mandiwanzira wrote a letter to POTRAZ requesting that POTRAZ facilitates a donation of computers through its E-Learning Project, to Goromonzi South Schools. POTRAZ donated twenty computers for Goromonzi South Constituency schools. The computers were collected by the appellant’s brother, who also served as her driver, on her behalf. The brother signed the collection form.

6. POTRAZ made follow-ups on the donation with the appellant and the computers could not be accounted for. No school in Goromonzi South confirmed receipt of any of the donated computers, thereby showing that Goromonzi South schools had been permanently deprived of the computers donated to them by POTRAZ.
7. The value of the stolen computers was given as USD8 000,00. Nothing was recovered.

THE TRIAL

8. The appellant pleaded not guilty to the charge.
9. The State led evidence from three witnesses; Kennedy Dewera, Evans Kagonye and Gilbert Manyore. The State also produced documentary evidence which included:
 1. A letter by the appellant as the then Minister of Labour and Social Welfare, addressed to the Minister of Information, Communication, requesting for a donation of computers for schools in Goromonzi South Constituency.
 2. A letter by the then Minister of Information, Communication, Technology and Cyber Security, Honourable Supa Mandiwanzira directed to the chairman of the board of trustees being a request for a donation of computers for schools in Goromonzi Constituency.
 3. A list of primary and secondary schools scheduled to receive the donated computers.
 4. POTRAZ equipment handover form.
 5. A letter by the appellant to POTRAZ authorising Evans Kagonye to collect the donated computers.
10. A perusal of the documentary evidence in conjunction with the oral evidence adduced before the trial court shows that on 12 July 2018, POTRAZ facilitated the donation of laptops, which laptops were collected from POTRAZ by the appellant's brother and driver,

Evans Kagonye, acting on her behalf. He signed a handover form acknowledging that he had received the twenty laptops on behalf of the appellant. The top part of the handover form reads as follows:

“POTRAZ ICT EQUIPMENT HANDOVER FORM

The following ICT Equipment has been handed over to Hon. Kagonye for distribution to **Goromonzi South Schools** - *2 schools 10 computers per school.*
Purpose: E-Learning Project

LIST OF ICT EQUIPMENT HANDED OVER.
...”

The italicised part above is handwritten. The handover form thereafter reflected, in a columnar presentation, the make, model and serial number of each of the twenty laptops.

11. The form also contained the following portion:

“*I Evans Kagonye* in my capacity as *driver* have collected and agree to hold in trust the above ICT equipment for e-learning purposes on behalf of beneficiaries intended under the USF e-learning project. I undertake to hand over the ICT equipment to the intended beneficiaries submit a list of the beneficiaries and contact details to USF/POTRAZ within 30 days of receipt of the ICT equipment.”

The name and capacity which are in italics above, are also filled in by hand.

12. Below the portion quoted in para 11 above, the form called for information as to, *inter alia*, the recipient’s name, ID number, mobile number, signature, date and all this information was completed on the form. Evans Kagonye was indicated as the recipient. The form also indicated that the handover was done by one “H. Jena.” A perusal of the record reveals that her full name is Hilda Jena.

13. The evidence of Kennedy Dewera was to the effect that he was the Director of Universal Sarfs Fund, Postal and Courier Services and he managed programmes under the fund,

including the e-learning programme. He explained that the e-learning programme “*is designed to ensure that schools in areas that are underfunded can receive computers, internet connectivity, i.e. I.C.T. gadgets, projectors, printers, etc.*” It was his evidence that when the appellant made a request for the computers on 20 June 2018, he made it a point to check that none of the targeted schools had benefited from the fund before. Twenty computers were allocated to the appellant for distribution to any two of the twenty-eight schools that she had listed. He did the final execution process of the disbursement and the laptops were donated and collected by Evans Kagonye who came to collect them, with a letter signed by the appellant. This was because a request had been made by the appellant that Evans collect the computers on her behalf. Evans signed the handover forms upon collection of the laptops.

14. It was also the witness’s evidence that the terms of the donation handover forms were that once laptops had been donated, acknowledgement forms from the schools were supposed to be returned in thirty days. In the event that the forms were lost, follow ups would be done with the schools. The forms were handed over to Evans when he collected the laptops. In May, 2019, POTRAZ made a request for the forms but both Evans Kagonye and the appellant, failed to return them.
15. Upon request for the information, the appellant failed to disclose the schools which had received the computers. Such information would have enabled the witness to make a follow up with the schools, on the acknowledgement forms. It was thus the witness’ evidence that the result of the follow-up on the donation that he made on behalf of POTRAZ with the appellant was that the laptops could not be accounted for. The appellant

failed to give POTRAZ proof of receipt of such laptops by any two schools in Goromonzi South District.

16. The witness was clear that he only acted on the letter written on 20 June 2018 and that POTRAZ never received any other letter with a request from or on behalf of the appellant. It was also his evidence, in answer to questions put to him, that there was no distinction between a ‘laptop’ and a ‘computer’ as both served the same purposes. The importance and relevance of this part of the witness’ evidence will be appreciated when the appellant’s evidence in her own defence is related to later in this judgment.

In its assessment of the witness, the court *a quo* found that he was credible and that he stuck to his story which was supported by the documentary evidence available.

17. The second State witness was Evans Kagonye. He stated that in 2018 he was employed by the Ministry of Labour and Social Welfare as the appellant’s personal driver. The appellant is his sister. He gave evidence to the effect that he was tasked by the appellant’s personal assistant, one Catherine Befura, to go to POTRAZ and collect twenty computers. He however collected laptops and was made to sign upon collection. He prevaricated on whether or not he first delivered the laptops and the handover form to the appellant before the laptops were handed over to the party campaign committee. This happened during the election season.

The trial court found his evidence to be questionable.

18. Gilbert Manyore, the investigating officer in the case, was the State’s third and last witness. He had received an anonymous letter indicating that the appellant was involved in corrupt activities and thus commenced investigations. It came to his knowledge that the appellant

was supposed to have handed over donations of computers to schools. When he inquired which schools had received the computers, the appellant failed to provide such information. He stated that he had had sight of all the documents that indicated that the appellant, through Evans, had collected the computers from POTRAZ.

19. In defence, the appellant's evidence was to the following effect. She, through a letter dated 26 June 2018, wrote to the Ministry of ICT requesting for computers. She was however made aware that they were out of computers but had 'laptops'. POTRAZ subsequently called her office for her to collect twenty laptops on 12 July 2018. She acknowledged having directed Evans to collect the laptops on her behalf. The appellant contended that when the laptops were collected by Evans, they were handed over to the campaign committee and that she was present only on two occasions when two of the laptops were distributed. However, at the time the remaining laptops were handed over to the beneficiaries she had left the country. In support of this, copies of her VISA and passport pages were tendered as exhibits during trial.
20. The appellant's defence was that the request for computers was not the same as a request for laptops. The appellant submitted that unlike the request for computers, which computers were to be donated to schools, the request for laptops was meant for the less privileged people. She indicated that the laptops had been distributed to students during her campaigns. The appellant however failed to account for the laptops through their serial numbers. She did not keep a record of the recipients of the laptops. Such information was never recorded for purposes of accountability. Her explanation was that she did not think that such information was required by POTRAZ.

21. The appellant denied having received from Evans the signed handover form or having had sight of its contents.
22. Under cross examination the appellant was asked whether POTRAZ requested her to do another letter specifically requesting laptops and her answer was in the negative. Her answer was also in the negative when she was asked whether a separate letter was written authorizing Evans to collect laptops since the letter dated 12 July 2018 only spoke of computers.
23. Catherine Befura gave evidence to the effect that when POTRAZ called their office to collect laptops, she asked the appellant to sign a letter in order for the laptops to be collected. When Evans brought and delivered the laptops, she never received any accompanying documentation from him. Twenty laptops were collected and delivered by Evans and she handed them over to the appellant's campaign manager. She averred that at the time of the donation there was no list of beneficiaries and she never recorded the serial numbers of the laptops.
24. The campaign manager, Malvin Matimura, stated in his testimony that the appellant had *"officiated (at) two centers to witness the distribution of the laptops. There is a house which got burnt and there was a girl called Nyasha going to school who needed a laptop so we went to the house with the accused. We gave them groceries, blankets and laptop. ... We went to Holy Creche which is led by Mrs Kanengoni and we gave them a laptop."* When he was asked as to who distributed the other eighteen, his response was: *"We would arrive at the ward and we would give to the needy after an assessment."* On whether he had recorded any information relating to the specific persons who received the laptops, he said: *"These were donations some would simply give people and we would record in other*

instances and others were not recorded we were racing against time.” On whether he had any information concerning the laptops, he responded “We have two children whom we handed out laptops at a rally.”

25. Three recipients of the laptops testified in the trial court as having received laptops from the appellant and the laptops, as identified by their serial numbers, were tendered in evidence. Two of the laptops were donated to a Lower Sixth student and to an Upper Sixth student respectively, at the appellant’s campaign rallies. The two were university students at the time when they testified in court. The third beneficiary was a school for physically challenged children in Ruwa.

THE VERDICT AND SENTENCE

26. The trial court identified the issues that it had to resolve as follows:

“The issues to be resolved by this court are as follows:-

1. Were the laptops given to the accused under trust with specific instructions to be followed that is they were to be given to schools in Goromonzi South Constituency or were a donation to assist the accused in her campaign.
 2. The court must establish whether or not the laptops were trust property creating a duty upon the accused to account for the laptops.
 3. Whether or not if the laptops were trust property the accused failed to account for them.”
27. After analyzing all the evidence adduced before it, the trial court found that all the elements of the offence had been established and that the State had proved her guilt beyond reasonable doubt and convicted the appellant. It found that the appellant had received the twenty laptops/computers. It also found that the appellant, well aware of her obligation to deliver the same to schools in Goromonzi South Constituency under the e-learning project,

proceeded to donate two laptops to tertiary students at campaign rallies and a third one to the Ruwa school for the physically challenged. She however failed to account for the other seventeen laptops when called upon to do so by POTRAZ.

28. The court passed the following sentence on the appellant:

“36 months imprisonment of which 12 months will be suspended on condition of good behaviour. The court would have suspended only 6 months but due to the fact that she is a female offender with a child below 5 years, 12 months is justified.

The court will further suspend 8 months on condition of restitution. Accused will be asked to fully retribute because the three laptops shown to the court benefitted individuals and not schools for the government. (sic)

The accused will serve 16 months.”

THE APPEAL TO THE COURT A QUO

29. Aggrieved by the decision of the trial court, the appellant approached the court *a quo* on eight grounds of appeal. The appeal against conviction raised the following issues for determination:

- Whether the trial court correctly found, as a fact, that there was a trust agreement between the appellant and POTRAZ.
- If so, whether the 20 laptops were trust property.
- If so, whether the appellant failed to account for the laptops

30. In determining the issues arising from the grounds of appeal against conviction, the court *a quo* found that the conviction was unimpeachable. It found that there was no basis for disagreeing with the trial court’s assessment that Kennedy Dewera, the director of Universal Sarfs Fund was a credible witness. Before the trial court, Dewera had testified

that the twenty laptops were donated by POTRAZ to schools in Goromonzi South Constituency under the e-learning project. This was substantiated by the clear paper trail which was initiated by the appellant's request for the donation. The trail ended at the handover form, signed on her behalf by her brother and driver, Evans Kagonye.

31. The court *a quo* further found that the trial court was correct to effectively place no reliance on Catherine Befura's testimony that Evans brought the 20 laptops from POTRAZ without any documentation. It found that the trial court was correct in its rejection of Evans' evidence that he did not remember whether Hilda Jena gave him a copy of the completed POTRAZ computer handover form together with the laptops. The court *a quo* further found that the trial court correctly noted that Evans, the holder of a Master's Degree, could not have signed the document without reading it. There would have been no purpose in generating that particular piece of the paperwork in the first place if the process of handing over was as informal as Evans wanted the trial court to believe.
32. The court *a quo* further found that due process having been undertaken by all the relevant persons and institutions in the procuring and collection of the laptops, there was no way that the appellant, "*a whole cabinet minister*", would not know of the existence of the duly completed handover form at the material time that she disposed of the laptops. The court further found that it could not be accepted that she did not know that POTRAZ was the donor and the beneficiaries were two Goromonzi South Schools. This was because, firstly, the donation of laptops by POTRAZ was the reason for all the paper work from the beginning to the end, including her written authority for Evans to collect that very donation from POTRAZ. Secondly, the POTRAZ call preceded her letter, which Evans used to collect the laptops.

33. The court *a quo* further found that it was common cause that the appellant did not deliver the 20 laptops to the schools in Goromonzi and that she dealt with those laptops in a manner contrary to the trust agreement. The court found that in all the circumstances, the judgment of the trial court demonstrated that all the issues raised in the appeal against conviction had been properly decided against the appellant and that the appeal against conviction, was completely devoid of merit. It was for these reasons that the appeal against conviction was dismissed.

34. In relation to the appeal against sentence, the court *a quo* found that the trial court properly balanced the aggravating and mitigatory factors in assessing an appropriate sentence. It found that the trial court, which was reposed with the sentencing discretion, rendered full and sound reasons for the sentence that it imposed. The appellant who had the *onus* to persuade the court that the sentence is shocking did not go beyond asserting that the sentence is disturbingly inappropriate. The court further found that the sentence did not induce any sense of shock and that, if anything, it errs on the side of leniency.

35. The court *a quo* found that one of the appellant's key result areas was to enhance social protection of vulnerable groups in the country. As a Member of Parliament for the Goromonzi South Constituency, she also betrayed the school children and other members of her constituency. The appellant thus abused her position of trust, became an obstacle to social development and diverted the laptops acquired using public funds to her own selfish ends. It found that to this extent, the trial court discerned traits of corruption in the way that the appellant committed the offence, which it took into account in assessing sentence.

36. The court *a quo*, sitting as an appellate court, found that it could not interfere with the sentencing discretion of the trial court as the sentence did not induce a sense of shock. It found that the trial court did not misdirect itself in any way in assessing an appropriate sentence. It also took into consideration that the penalty for the crime of theft of trust property ranges from a Level 2 fine or twice the value of the property, whichever is greater, to a maximum of twenty-five years' imprisonment or both. The sentence imposed on the appellant fell within this range. Thus, the appeal against sentence was also dismissed.

THIS APPEAL

37. Aggrieved by the decision of the court *a quo*, the appellant has thus approached this Court on the following grounds of appeal.

GROUND OF APPEAL

1. The High Court grossly erred in finding that the appellant knew the conditions contained in the PORTRAZ Equipment Handover Form dated 12 July 2018 when the evidence clearly showed that the said conditions were not brought to the attention of the appellant at any stage before the trial at the Magistrates Court.
2. The High Court further grossly erred as a consequence in finding that the appellant had the required state of mind to commit a criminal offence when the 20 laptops were donated to needy persons in her constituency.
3. The High Court further grossly erred in failing to find that the appellant believed that the laptops had been donated by POTRAZ in accordance with her request of 26 June 2018 which was for donation of laptops to the needy in the constituency

as opposed to schools and therefore she did not act outside the terms of a trust agreement.

4. The High Court further grossly erred in failing to find that the letter of 26 July 2018 had been collected physically from the appellant's office by a driver from Minister Mandiwanzira's office hence the absence of a stamp by the Ministry on the copy produced in the Magistrates Court in the face of uncontested evidence to that evidence.
5. The High Court further grossly erred in failing to find that the Magistrate had convicted the appellant on the basis of finding her to have acted negligently in a matter requiring a positive mental element.
6. The High Court further grossly erred in failing to find that the Magistrate had placed upon the appellant the onus to prove her innocence in a criminal trial which is unprocedural.
7. The High Court further grossly erred in failing to find that the sentence imposed on the appellant was grossly outrageous and induced a sense of shock.

ISSUES FOR DETERMINATION

38. The appellant's case is predicated on the contention that the essential mental element of the charge of theft of trust property was not proved in the trial court and that the sentence was unduly harsh. The issues for this Court to determine are:

Whether the court *a quo* erred in confirming the conviction of the appellant and upholding the sentence. In particular, whether the appellant had the requisite state of mind to commit the crime. Secondly, whether the sentence imposed by the trial court ought to have been confirmed by the court *a quo*.

The requisite state of mind is important because at law, *actus non facit reum nisi mens sit rea*, translated to mean that an act is not unlawful unless there is a guilty mind.

SUBMISSIONS BEFORE THIS COURT

39. At the hearing of this appeal, Mr *Magwaliba*, for the appellant, submitted that when the laptops were collected, it was Evans Kagonye who signed the handover form which constituted a trust agreement and was to be handed over to the appellant. He argued that there was no evidence placed before the trial court to the effect that the trust agreement was handed over to the appellant and that she was aware of the contents of the agreement.
40. Counsel further submitted that the evidence placed before the trial court did not prove an essential element of the offence. He averred that an essential element of the offence of theft of trust property that the State ought to prove is the mental element, being the intention to commit the crime. He further averred that the trial court was not satisfied that the appellant had the intention to commit the fraud but, on the contrary, found that the appellant was ignorant of her obligation to account. He contended that an intention to commit the crime had not been proved.
41. Counsel argued that the trial court never made a finding that the appellant was aware of the terms of the trust agreement. He submitted that the other two witnesses who testified on behalf of the State did not say that the appellant was aware of the contents of the handover form. Counsel submitted that the duty to account for the laptops arose from the handover form and without being aware of the handover form, the trial court could not possibly have convicted the appellant of the offence.

42. *Per contra*, Mr *Muchemwa*, for the respondent, submitted that the finding of the court *a quo* that the laptops constituted trust property could not be faulted. He averred that Evans Kagonye was mandated to collect the laptops on behalf of the appellant through a letter which originated from the appellant. He submitted that the laptops were donated to the appellant in response to her request for the donation of laptops for schools in the Goromonzi South District in furtherance of the e-learning programme. He submitted that after having collected twenty laptops from POTRAZ, the appellant could only account for three laptops which she said were given away as donations at her campaign rallies and that this was contrary to the trust agreement.
43. The respondent's counsel submitted that the argument by the appellant that she was not aware of the contents of the handover form defied logic considering that the letter which gave Evans the powers to collect the items came from and was signed by her. After collection, the laptops were brought to the appellant's offices by Evans, who had signed the handover form with the direction on how they were to be distributed; to two schools in her constituency. He further argued that whilst there might not be evidence that the appellant was given the handover form, it was undisputed that she sent Evans Kagonye to collect "computers" in accordance with her request of 20 June 2018. He also argued that she was aware that the "computers" which Evans delivered at her offices, were for distribution to the schools in her constituency, otherwise she would have sought further clarification from POTRAZ on what to do with them. He therefore contended that she ought to have donated the laptops in accordance with her request and accounted for such donations.

ANALYSIS

44. Section 113 (2) of the Code, in terms of which the appellant was charged provides as follows:

“Subject to subsection (3), a person shall also be guilty of theft if he or she holds trust property and, in breach of the terms under which it is so held, he or she intentionally-

(a) omits to account or accounts incorrectly for the property; or

(b) hands the property or part of it over to a person other than the person to whom he or she is obliged to hand it over; or

(c) uses the property or part of it for a purpose other than the purpose for which he or she is obliged to use it; or

(d) converts the property or part of it to his or her own use.”

45. Her letter dated 20 June 2018, to “Hon Supa C. Mandiwanzira [MP], Minister of Information, Communication and Technology” reads:

“RE: REQUEST FOR DONATION OF COMPUTERS FOR SCHOOLS IN GOROMONZI SOUTH CONSTITUENCY”

The above matter refers.

I am hereby requesting a donation of computers for my Constituency, Goromonzi South. We have 28 schools which are electrified and could definitely benefit from your assistance with regard to a generous donation of computers. If resources permit, could you kindly avail at least 10 – 15 computers per school. Please find attached list of Primary and Secondary schools requiring assistance.”

46. On the same date, “Hon. Supa C. Mandiwanzira [MP], Minister of Information Communication Technology and Cyber Security” wrote a letter to the Chairman of the Board of Trustees, Universal Services Fund and copied his letter to the appellant, the Permanent Secretary, Ministry of ICT and Cyber Security and to the Director General, POTRAZ. In the letter, the Minister was commending the appellant’s “*request for*

computers for various schools in her constituency as per the attached letter dated 20 June 2018.”

47. The appellant purported to make a great deal of a letter allegedly dated 26 June 2018 indicating that she therein requested twenty laptops for distribution to the needy in her constituency. She claimed that she believed that to be the request that POTRAZ was responding to when the twenty laptops were availed. The said letter was addressed to Hon S. Mandiwanzira, Minister of Information, Communication and Technology (ICT). The letter bore the date stamp of the appellant’s Ministry only. It did not bear the purported recipient Ministry’s stamp.
48. The letter did not, on the face of it, show that it was actioned by the Minister to whom it was addressed in the manner that the letter of 20 June 2018 showed on the face of it, that he actioned the appellant’s request of the same date, 20 June 2018. On receipt of the appellant’s letter of 20 June 2018, the Minister of ICT wrote on the same date to “The Chairman of the Board of Trustees, Universal Services Fund”. He copied it to the appellant, the Permanent Secretary, Ministry of ICT and Cyber Security and to the Director General, POTRAZ.
49. The appellant’s letter of 26 June 2018, six days after the letter dated 20 June 2018, reads:

“RE: REQUEST FOR DONATION OF 20 LAPTOPS FOR DISTRIBUTION IN GOROMONZI SOUTH CONSTITUENCY”

The above matter refers.

Following our conversation in the morning, I do hereby submit my written request for a donation of 20 laptops for distribution according to need in my constituency. We would also appreciate it if we can get a written communication regarding our schools that you have put on the waiting list to receive computers for easier reference when following up.

Your positive response will be greatly appreciated.”

50. There is no indication, let alone proof, that the letter was ever dispatched or even received by the addressee. The appellant’s stance was that it was collected from her offices by personnel from the recipient Minister’s offices, hence the lack of a date stamp from the recipient Ministry. However, a perusal of the record shows that she did not receive a response similar to the earlier letter, whereby the Minister of ICT had actioned her request with the Chairman of the Board of Trustees, Universal Services Fund and copied her, amongst other officials. She never received any communication acknowledging receipt of her request for laptops. On the other hand, the record shows that she was made aware that her request of 20 June 2018 for computers had been forwarded to the relevant authority. It also shows that her mandate to Evans to collect computers is in sync with what she knew was being processed, computers, not laptops. It is also undeniable that Evans signed the handover form whose contents have already been related to earlier.
51. In this letter the appellant purports to distinguish between laptops and computers, a distinction that State witness Dewera said is of no consequence. The appellant’s claim that she believed that it was this request that was being responded to by the donation from POTRAZ is rendered unworthy of belief because in her communication, per exhibit 5, dated 12 July 2018 addressed to POTRAZ, “Attention: Hilda Jera” she wrote:

“RE: COLLECTION OF DONATED COMPUTERS

The above subject refers.

Please allow *Evans Kagonye* to collect the donated computers on behalf of the Minister of Labour and Social Welfare, Honourable Petronella Kagonye. His I.D. number is 25-080468 C 25.

Please assist him in whichever way possible and for more information please contact our office.”

52. Going by her distinction between computers and laptops, she sent Evans to go and collect computers, not laptops. Her authority for Evans to do the collection should, if her adopted stance was to be believed, have been for the collection of laptops and not computers as reflected in the document that she signed.

53. She had made a request for computers to donate to schools. Her request was acceded to in line with the e-learning programme. She sent Evans to go to collect the computers. These could not have been anything but trust property. The Code defines “trust property” in the following terms:

“means property held, whether under a deed of trust or by agreement or under any enactment, on terms requiring the holder to do any or all of the following-

- (a) hold the property on behalf of another person or account for it to another person; or
- (b) hand the property over to a specific person; or
- (c) deal with the property in a particular way; but does not include property received on terms expressly or impliedly stipulating that-
 - (i) the recipient is entitled to use the property as his or her own; and
 - (ii) there would only be a debtor and creditor relationship between the parties.”

54. The appellant ought, in the circumstances as shown by the evidence, to have donated the computers to two schools in her constituency in order to fulfil the terms of the trust. She was not to use the property as her own. There was no question of a debtor and creditor relationship involved in the donation.

55. It is highly improbable that Evans would choose to deliver the laptops but not the handover form that he signed on collection of the items. In his testimony, Evans prevaricated on whether he handed the form together with the laptops to the appellant's Personal Assistant (PA). The appellant also did not remember whether or not she was personally informed of the delivery by Evans. Her PA could also not recall if Evans delivered the laptops together with the handover form. The trial court correctly found Evans evidence on this aspect to be questionable. After all, his mandate was to simply collect and deliver the e-learning equipment with its accompanying documentation. It is inconceivable that he would have failed to deliver both. The handover form would have enabled him to account for the number of laptops that he collected. The handover form could not, therefore, possibly have disappeared without trace and without reaching the appellant who had sent him to collect the computers. After all, Evans, as a holder of a Masters' degree was literate and the appellant, as a Cabinet Minister, would be knowledgeable about the accountability requirements for the donations emanating from POTRAZ.
56. In the event that Evans perchance misplaced the form, the laptops would not cease to be trust property. The appellant specifically requested for computer donations for schools in her constituency. The only letter that was ever received and actioned by the Minister of ICT and upon which Evans was sent to collect computers related to the schools' donations. The delivery of the computers, in keeping with her request, perfected the trust agreement which she had initiated in her letter of 20 June, 2018. In the result, the donations made at political campaign rallies were not sanctioned by POTRAZ. The trust property was not therefore handed to the intended beneficiaries.

57. The trial court cannot be faulted for disbelieving the appellant whose evidence it found to be “filled with inconsistencies” and for finding that her guilt had been established beyond reasonable doubt. *A fortiori*, the court *a quo* cannot be faulted for agreeing with the trial court and finding that all the issues raised in the appeal against conviction before it, had been properly decided against the appellant.
58. Three laptops were given to two students and one to a school for physically challenged children. Seventeen laptops have never been accounted for. The appellant initially told the trial court that she had a record of where all the laptops went and that it was with her secretary but the secretary’s evidence did not confirm this. The secretary told the court that such a record did not exist. What this means is that even if these laptops were not meant for schools but for the needy in her constituency, as she claimed, there still is no account or record of where they went. The appellant’s stance is that they were all distributed. However, the distribution was not made to any school.
59. Clearly, on the evidence found by the trial court and confirmed by the court *a quo*, the essential elements for theft of trust property prescribed in a contravention of s 113 (2) of the Code were satisfied. The appellant intentionally failed to account for the distribution of the twenty laptops in accordance with the trust agreement that was perfected by their collection and delivery by Evans on 12 July 2018. The laptops constituted trust property in keeping with her request of 20 June 2018 upon which she mandated Evans to collect them from POTRAZ. She neither handed over the property to the intended beneficiaries nor utilised it for its intended purpose. In these circumstances, the court *a quo* correctly upheld her conviction by the trial court, on the charge of theft of trust property. We therefore find the six grounds of appeal that were raised against her conviction to be devoid of merit.

60. Amongst its several compelling and well thought out reasons for the sentence that it imposed on the appellant, the trial court also stated that it was “*alive to the fact that the accused was not convicted of a corruption matter but however the fact that a public institution is involved and public funds are available will somehow demand that to a certain extent traits of corruption be seen in the manner in which the accused conducted.*” (sic)

61. At para 43 of the court *a quo*'s judgment, the following is stated, *inter alia*, with respect to the appeal against sentence:

“We do not agree that the trial court sentenced the appellant on the principles applicable to the offence of criminal abuse of duty as a public officer as defined in s 174 of the Criminal Law Code. The trial Court took into account the fact that at the time the offence was committed, the appellant was the Minister of Public Service, Labour and Social Welfare. Accordingly, one of her key result areas was to enhance social protection of vulnerable groups in the country. The E-Learning project was put in place to support rural schools by providing computers for use by vulnerable school children. The appellant was the best person to have appreciated the need to take the laptops to rural schools. As a way of removing some of the barriers to accessing education. As a member of Parliament, she also betrayed the school children and other members of Goromonzi South Constituency at large. She abused her position of trust. She became an obstacle to social development. She diverted laptops acquired using public funds for her own selfish ends. To that extent, the trial court discerned traits of corruption in the way that the appellant committed the offence and was mindful of that in assessing sentence. We do not think that it is tantamount to sentencing on the basis that the appellant had committed the offence of criminal abuse of duty as a public officer.”

62. The court *a quo* held that sitting as an appellate court, it could interfere with the sentencing discretion of the trial court only if the sentence is disturbingly severe to the extent of inducing a sense of shock or where there was an improper or unreasonable exercise of discretion. The court found that the sentence imposed by the trial court was not shocking and that the trial court did not misdirect itself in any way in assessing an appropriate sentence. It found that the appeal against sentence also lacked merit.

63. We find no misdirection on the part of either the court *a quo* or the trial court. The laptops were not donated to schools as required by their source. They have not been accounted for to date. Furthermore, even if, for argument's sake, it was to be accepted that the laptops were donated in accordance with the appellant's request of 26 June 2018, and this, the evidence does not establish, she still has not accounted for the laptops to date.

DISPOSITION

64. In light of the foregoing analysis, we find that the decision of the court *a quo* cannot be faulted. The conviction accords with the evidence placed before the trial court. The sentence was justified by cogent reasons and considerations. The court *a quo* had no basis for upsetting the decision of the trial court in respect of both conviction and sentence. The court *a quo* aptly observed that the penalty for the crime of theft of trust property ranges from a Level 2 fine or twice the value of the property, whichever is greater, to a maximum of twenty-five (25) years imprisonment or both. It held that the sentence imposed falls within the prescribed range. The single ground of appeal against sentence is also unmeritorious and must be dismissed.

65. We find no misdirection at all. The appeal is, therefore, devoid of merit. It is accordingly ordered as follows:

“The appeal be and is hereby dismissed in its entirety.”

CHIWESHE JA : I agree

KUDYA JA : I agree

Mahuni Gidiri Law Chambers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners